No. 85-499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

B.H. PAPASAN
SUPERINTENDENT OF EDUCATION, *et al.*,
Petitioners,

v.

WILLIAM A. ALLAIN
GOVERNOR, STATE OF MISSISSIPPI, *et al.*,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF ON THE MERITS

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. May the Chickasaw Cession schoolchildren be afforded prospective injunctive relief to prevent the continuation of, a.. . to remedy the current conditions resulting from, the breach of the federal school lands trust by state officials?

2. Does the discriminatory denial of a minimally adequate free public education to the Chickasaw Cession schcolchildren constitute a violation of the equal protection clause?

LISTING OF PARTIES

Petitioners:

B.H. PAPASAN, Superintendent of Public Education, Tunica County School District, Tunica, Mississippi;
WESLEY BAILEY, Member, Board of Education, Tunica County School District, Tunica, Mississippi;
JOHN E. MATTHEWS, Member, Board of Education, Tunica County School District, Tunica, Mississippi;
RICHARD HUSSEY, Member, Board of Education, Tunica County School District, Tunica, Mississippi;
E.M. HOOD, JR., Member, Board of Education, Tunica County School District, Tunica, Mississippi;
CLIFFORD GRANBERRY, Member, Board of Education, Tunica County School District, Tunica, Mississippi;
JAMES E. HATHCOCK, Superintendent, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
JIM YOUNG, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
RUSSELL JACKSON, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
FAITH WEST, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
KELLY TUCKER, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
DON BETHAY, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
TONY V. PARKER, Superintendent of Public Education, Alcorn County School District, Corinth, Mississippi;
H.T. BENDERMAN, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;
RAY HUGHES, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;
FRANK ELDRIDGE, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;

BOBBY CALDWELL, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;
HERSCHEL WILBANKS, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;
HOLACE MORRIS, Superintendent, Amory Municipal Separate School District, Amory, Mississippi;
HERMON HESTER, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
DAVID HODO, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
EDDIE WOMBLE, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
W.G. PRUEITT, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
THOMAS GREER, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
DOUGLAS AUTRY, Superintendent of Public Education, Benton County, School District, Ashland, Mississippi;
LAFAY WEATHERLY, Member, Board of Education, Benton County School District, Ashland, Mississippi;
SHIRLEY MOHUNDRO, Member, Board of Education, Benton County School District, Ashland, Mississippi;
MINNIE LEE CHILDERS, Member, Board of Education, Benton County School District, Ashland, Mississippi;
JOHN DAUGHTERY, Member, Board of Education, Benton County School District, Ashland, Mississippi;
JOE GRIST, Member, Board of Education, Benton County School District, Ashland, Mississippi;
GRADY FERGUSON, Superintendent of Education, Calhoun County School District, Pittsboro, Mississippi;
MIKE DUNAGIN, Member, Board of Education, Calhoun County School District, Pittsboro, Mississippi;
BROOKS BRASHER, Member, Board of Education, Calhoun County School District, Pittsboro, Mississisppi;
CHARLIE CLARK, Member, Board of Education, Calhoun County School District, Pittsboro, Mississippi;
CHARLES C. HARDIN, Member, Board of Education, Calhoun County School District, Pittsboro, Mississippi;

PAUL LOWE, Member, Board of Education, Calhoun County School District, Pittsboro, Mississippi;
O. WAYNE GANN, Superintendent, Corinth Municipal Separate School District, Corinth, Mississippi;
GLEN PARKER, Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
SARAH HARRIS, Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
J.B. DARNELL, Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
WILLIE DAVIS, Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
JOHN BREWER TOMLINSON, JR., Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
ALBERT L. BROADWAY, Superintendent of Public Education, DeSoto County School District, Hernando, Mississippi;
ROBERT C. DICKEY, Member, Board of Education, DeSoto County School District, Hernando, Mississippi;
HARVEY G. FERGUSON, JR., Member, Board of Education, DeSoto County School District, Hernando, Mississippi;
WAYNE D. HOLLOWELL, Member, Board of Education, DeSoto County School District, Hernando, Mississippi;
HAROLD O. MOORE, Member, Board of Education, DeSoto County School District, Hernando, Mississippi;
MARTHA TACKETT, Member, Board of Education, DeSoto County School District, Hernando, Mississippi;
DWIGHT SHELTON, Superintendent, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
ROBERT HILL, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
PARKER BELL, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
DONALD STREET, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;

TRUDY BYARD, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
CHRISTINE RATCLIFF, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
JERRY STONE, Superintendent, Iuka Special Municipal Separate School District, Iuka, Mississippi;
C. NEIL DAVIS, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;
CHARLES LEWIS, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;
NEIL SCHILLINGS, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;
FRANK JIMMAR, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;
STANLEY DEXTER, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;
JIMMY LYNN NELSON, Superintendent of Public Education, Lafayette County School District, Oxford, Mississippi;
EARL BABB, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
JAMES E. HAMILTON, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
JAMES C. STONE, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
WILLIAM BUFORD, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
C.W. WHITE, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
JAMES R. BRYSON, Superintendent, New Albany Municipal Separate School District, New Albany, Mississippi;
BOBBY GAULT, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;
BEN KITCHENS, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;

DAVID HOLMES, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;
DR. DAVID ELLIS, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;
MALCOLM HICKEY, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;
HOSEA A. GRISHAM, Superintendent, North Panola Consolidated School District, Sardis, Mississippi;
DEMSEY COX, Trustee, North Panola Consolidated School District, Sardis, Mississippi;
CHARLES BLAKELY, Trustee, North Panola Consolidated School District, Sardis, Mississippi;
TAYLOR JEFF McLEOD, Trustee, North Panola Consolidated School District, Sardis, Mississippi;
REID P. DORR, Trustee, North Panola Consolidated School District, Sardis, Mississippi;
POLLY GORDON, Trustee, North Panola Consolidated School District, Sardis, Mississippi;
BILLY D. STROUPE, Superintendent, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
TATE RUTHERFORD, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
FRANCIS HOPPER, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
JOE McMILLAN, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
BILLY H. AYERS, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
J.W. McMILLAN, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
DR. BOB McCORD, Superintendent, Oxford Municipal Separate School District, Oxford, Mississippi;
LEONARD E. THOMPSON, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;
REBECCA L. MORETON, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;

RONALD F. BORNE, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;
DOROTHY B. HENDERSON, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;
W.N. LOVELADY, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;
JOE B. HARTLEY, Superintendent of Public Education, Panola County School District, Batesville, Mississippi;
WILLIAM STILL TAYLOR, Member, Board of Education, Panola County School District, Batesville, Mississippi;
ANN WHITTEN BRAME, Member, Board of Education, Panola County School District, Batesville, Mississippi;
TRAVIS D. MURPHREE, Member, Board of Education, Panola County School District, Batesville, Mississippi;
CECIL WARDLAW, Member, Board of Education, Panola County School District, Batesville, Mississippi;
HARRY O'NEILL, Member, Board of Education, Panola County School District, Batesville, Mississippi;
BILLY CURBOW, Superintendent, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
BUDDY MONTGOMERY, Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
LARRY YOUNG, Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
THOMAS CHEWE, Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
RAY LEEPER, JR., Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
JEAN MAPP, Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
JAY W. GREENE, Superintendent of Public Education, Prentiss County School District, Booneville, Mississippi;
EDWIN BROWN, Member, Board of Education, Prentiss County School District, Booneville, Mississippi;
LARRY JOE CROSBY, Member, Board of Education, Prentiss County School District, Booneville, Mississippi;

CLIFTON RUMMAGE, Member, Board of Education, Prentiss County School District, Booneville, Mississippi;
BILLY WIMBERLEY, Member, Board of Education, Prentiss County School District, Booneville, Mississippi;
HAROLD WOODRUFF, Member, Board of Education, Prentiss County School District, Booneville, Mississippi;
C.R. RIALS, Superintendent, Senatobia Municipal Separate School District, Senatobia, Mississippi;
MILLS CARTER, Trustee, Senatobia Municipal Separate School District, Senatobia, Mississippi;
W.R. PERKINS, Trustee, Senatobia Municipal Separate School District, Senatobia, Mississippi;
JAMES JACKSON, Trustee, Senatobia Municipal Separate School District, Senatobia, Mississippi;
MAURICE BATEMON, Trustee, Senatobia Municipal Separate School District, Senatobia, Mississippi;
DAVID C. COLE, Superintendent, South Panola Consolidated School District, Batesville, Mississippi;
BRYANT WOODRUFF, Trustee, South Panola Consolidated School District, Batesville, Mississippi;
O.T. MARSHALL, Trustee, South Panola Consolidated School District, Batesville, Mississippi;
J.H. MOORE, Trustee, South Panola Consolidated School District, Batesville, Mississippi;
ALTON MILAM, Trustee, South Panola Consolidated School District, Batesville, Mississippi;
LEONARD MORRIS, Trustee, South Panola Consolidated School District, Batesville, Mississippi;
JACK HARRIS, Superintendent, South Tippah Consolidated School District, Ripley, Mississippi;
CLARENCE STANFORD, Trustee, South Tippah Consolidated School District, Ripley, Mississippi;
EDWARD BURGE, Trustee, South Tippah Consolidated School District, Ripley, Mississippi;

T.C. MAUNEY, JR., Trustee, South Tippah Consolidated School District, Ripley, Mississippi;
J.C. NEWBY, Trustee, South Tippah Consolidated School District, Ripley, Mississippi;
H.L. HELLUMS, Trustee, South Tippah Consolidated School District, Ripley, Mississippi;
DONALD MERRITT CLANTON, Superintendent Of Public Education, Tate County School District, Senatobia, Mississippi;
BYRON DURLEY, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
ROBERT BARRY EMBREY, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
STEVE BENTON LENTZ, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
HUEL STANLEY BLAIR, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
SAMMY BENFORD ASHE, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
DR. JULIAN PRINCE, Superintendent, Tupelo Municipal Separate School District, Tupelo, Mississippi;
AARON MORGAN, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;
JIMMY FLOYD, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;
MRS. DOYCE REAS, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;
CHARLIE GREEN, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;
STEVE NORWOOD, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;
SAMMY S. DOWDY, Superintendent of Public Education, Union County School District, New Albany, Mississippi;
L.H. PARNELL, Member, Board of Education, Union County School District, New Albany, Mississippi;
CLEO FOOSHEE, Member, Board of Education, Union County School District, New Albany, Mississippi;

GARLAND GRAY, Member, Board of Education, Union County School District, New Albany, Mississippi;
IRA KUYKENDALL, Member, Board of Education, Union County School District, New Albany, Mississippi;
PALMER SMITH, Member, Board of Education, Union County School District, New Albany, Mississippi;
ALFRED S. REED, JR., Superintendent, Water Valley Line Consolidated School District, Water Valley, Mississippi;
FRANK B. BROOKS, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;
LILLY B. HORAN, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;
DANNY ROSS INGRAM, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;
BENNIE COLE TAYLOR, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;
JOHN EDDIE ROGERS, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;
TOM LOTT, Superintendent, West Point Municipal Separate School District, West Point, Mississippi;
ROBERT L. CALVERT, III, Trustee, West Point Municipal Separate School District, West Point, Mississippi;
PETER THOMAS HODO, JR., Trustee, West Point Municipal Separate School District, West Point, Mississippi;
JOHN H. PARKER, SR., Trustee, West Point Municipal Separate School District, West Point, Mississippi;
WILLIAM LESLIE CHRISTIAN, Trustee, West Point Municipal Separate School District, West Point, Mississippi;
CORNELIA WALKER, Trustee, West Point Municipal Separate School District, West Point, Mississippi;

LASONDRA ADDISON, a minor, by and through her mother and next friend, Linda Addison;

CHARLES RAY ALLEN, II, a minor, by and through his father and next friend, Charles Ray Allen;
NANCY ELIZABETH BEEBE, a minor, by and through her father and next friend, Robert John Beebe;
PHYLLIS CAROL BELL, a minor, by and through her father and next friend, Wallace L. Bell;
KERRY MILLS BRYSON, a minor, by and through his father and next friend, James R. Bryson;
JONATHAN ANDREW BUNCH, a minor, by and through his father and next friend, Austin W. Bunch;
MELISSA ANNE CLEMMONS, a minor, by and through her father and next friend, John Edgar Clemmons, Jr.;
CARL RICKEY COLEMAN, a minor, by and through his father and next friend, Albert Coleman;
DEE ANN COX, a minor, by and through her father and next friend, Bobby Joe Cox;
J0 VICKI DENISE GANN, a minor, by and through her father and next friend, O. Wayne Gann;
GALEN VINCENT HENDERSON, a minor, by and through his father and next friend, G.W. Henderson, Jr.;
SHERRY RENAE HOGUE, a minor, by and through her father and next friend, Charles Archer Hogue;
YOLANDA JACKSON, a minor, by and through her mother and next friend, Sarah A. Jackson;
FLORENCE DENISE JONES, a minor, by and through her father and next friend, Cleveland Hoover Jones;
AMY J. LIVINGSTON, a minor, by and through her father and next friend, Stephen Price Livingston, Sr.;
MINNIE LUCILLE LONG, a minor, by and through her father and next friend, John Henry Long;
UNSELD MASON, a minor, by and through his mother and next friend, Shirley Mason;
PRELNA RENEE McNEIL, a minor, by and through her mother and next friend, Juanita W. McNeil;

CHRISTOPHER DOUGLAS PRUETT, a minor, by and through his father and next friend, Kenneth Douglas Pruett;
SCOTTY GLEN PURDEN, a minor, by and through his grandmother, guardian and next friend, Grace Purden;
SAMMY CLARK RICHEY, a minor, by and through his father and next friend, Samuel Larry Richey;
RYAN K. ROBINSON, a minor, by and through his mother and next friend, Mary K. Robinson;
THOMAS JASON RUSSELL, a minor, by and through his father and next friend, Jimmy Darrell Russell;
MICHAEL EDWARD SMITH, a minor, by and through his father and next friend, Ralph Edward Smith;
SHARLENE ANN STOREY, a minor, by and through her father and next friend, Thomas B. Storey;
WALTER LEE WELCH, a minor, by and through his mother and next friend, Francis Onell Welch;
JAMES MIKE WORTHAM, a minor, by and through his mother and next friend, Inell Corbitt Wortham;
DANIEL GRIFFIN WREN, a minor, by and through his father and next friend, Tommy Wayne Wren.

Respondents:

WILLIAM A. ALLAIN, Governor, State of Mississippi;
RICHARD MOLPUS, Secretary of State and Member of the Board of Education and Member of the Lieu Land Commission, State of Mississippi;
RICHARD A. BOYD, Superintendent of Education and Member of the Board of Education and Member of the Lieu Land Commission, State of Mississippi;
EDWIN LLOYD PITTMAN, Attorney General and Member of the Board of Education and Member of the Lieu Land Commission, State of Mississippi;
CONNIE SLAUGHTER-HARVEY, Assistant Secretary of State, State of Mississippi

The original federal defendants have, by joint stipulation, been dismissed from this lawsuit. The federal defendants no longer have an interest in this case and are not parties to the petitioning of this Court.

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CERTIFICATE OF SERVICE

I, T.H. FREELAND, III, counsel of record for petitioners, do hereby certify that I have this day mailed, postage prepaid, three true and correct copies of Brief on the Merits and Joint Appendix to:

HONORABLE R. LLOYD ARNOLD
SPECIAL ASSISTANT ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205

This, the 24th day of January, 1986.

T.H. FREELAND, III

OPINIONS BELOW

Court of Appeals: The panel decision of the Court of Appeals for the Fifth Circuit, dated April 5, 1985, is reported as *Papasan v. United States*, 756 F.2d 1087 (1985)(P.A. A-3).* The Order denying rehearing or rehearing *en banc* was issued on May 21, 1985 (P.A. A-1).

District Court: The Order dismissing with prejudice is unpublished (P.A. A-37).

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was delivered on April 5, 1985. A timely petition for panel rehearing and a suggestion for rehearing *en banc* was denied May 21, 1985. By Order of August 6, 1985, petitioners' time to file a Petition for a Writ of Certiorari was extended to September 18, 1985, and the Petition was filed on that date. On December 2, 1985, this Court granted the Petition for Writ of Certiorari, and on January 3, 1986, Petitioners' time to file its Brief on the Merits was extended to January 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1948).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

U.S. Const. art. I, § 10

> "No State shall...pass any...Law impairing the Obligation of Contract..."

U.S. Const. amend. XIV, § 1

> "No state shall...deny to any person within its jurisdiction the equal protection of the laws."

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*References to the Appendix to the Petition for Writ of Certiorari are indicated by (P.A.). References to the Joint Appendix are indicated by (J.A.).

Federal Statutes:

1803 Land Sales Act for Mississippi 2 Stat. 229 ch. XXVII (1803)(J.A. 54).

Mississippi Enabling Act, 3 Stat. 348 ch. XXIII (1817)(J.A. 56).

Authorization of Sale of Lieu Lands, 10 Stat. 6 ch. XXXV (1852)(J.A. 63).

42 U.S.C. § 1983 (1979)

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects or causes to be subjected, any citizen...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Course of Proceeding and Disposition Below

This action was filed in the United States District Court for the Northern District of Mississippi, Delta Division. (J.A. 1). The Petitioners are schoolchildren, school superintendents, and members of school boards of the twenty-three Chickasaw Cession counties in North Mississippi. The respondents are a group of officials of the State of Mississippi charged with carrying out the duties of the state as trustee of the school lands trust. Complaint ¶ 13 (J.A. 5). The state officials who were sued were: the Governor, the Secretary of State, the State Superintendent of Education, the Attorney General, and the Assistant Secretary of State in charge of the State Land Office. Complaint ¶ 13 (J.A. 5).

The complaint alleged that state officials were committing a continuing breach of the federal school lands trust, and that the breaches violated the contracts clause as well as the equal protection clause. The state officials filed a motion to dismiss for failure to state a claim. (J.A. 31). This motion was granted by the district court. (P.A. A-36-38). On appeal, the Court of Appeals for the Fifth Circuit affirmed the dismissal, rejecting the equal protection claim on the merits, and holding that all other claims—including law claims for prospective, injunctive relief for federal school land trust violations—were barred by the eleventh amendment. *Papasan v. United States*, 756 F.2d 1087, 1096 (5th Cir. 1985) (P.A. A-35). On May 21, 1985, the Fifth Circuit issued an order denying a rehearing en banc. (P.A. A-1). After additional time for filing was granted, a timely Petition for Writ of Certiorari was filed in this Court on September 18, 1985. On December 2, 1985, certiorari was granted by this Court.

STATEMENT OF FACTS[1]

(A) The Allegations and Claims of the Complaint

The Complaint alleged that the State of Mississippi acquired its title and duties as trustee for a school lands trust that is

> irrevocable and [granted] in perpetuity for the use and benefit of Plaintiffs and the Plaintiff class. . . .
>
> -Complaint ¶ 42 (J.A. 16).

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[1] This case was dismissed on a motion under Fed. R. Civ. P. 12(b), making the record woefully undeveloped. The statement of facts is based primarily on the allegations of the complaint, statutory and public-record documents such as the Mississippi state budget, governmental reports, and materials from historical treatises.

In derogation of their duties as trustee, state officials sold the lieu lands that had been given. Complaint ¶¶ 30-32, 45, 47 (J.A. 12, 17-18). The proceeds from the sale were not set aside or reserved, but rather were "invested by the State Defendants in unwise, imprudent, and unlawful investments . . . [which] [b]y reason of the defaults of the State Defendants, . . . have all failed and the funds accordingly been lost." Complaint ¶ 32(a)(J.A. 12-13). The state officials had the duties of a common-law trustee in managing the trust. Complaint ¶ 45 (J.A. 17-18). The breach of these duties by state officials form the basis of the claim for mismanagement of the trust. They also form the basis of the claims for violation of the contracts clause. Complaint ¶¶ 45, 57-58 (J.A. 17-18, 22). Breach of both the federal trust obligations and the contracts clause formed the basis for a claim under 42 U.S.C §1983. Complaint ¶¶ 47(h), 57, 58 (J.A. 18, 22).

The Complaint further alleges that state officials have guaranteed and provided for schoolchildren in the non-Chickasaw Cession counties a fully-funded school lands trust, while denying a fully-funded trust in the Chickasaw counties. Complaint ¶¶ 37-38, 51-55 (J.A. 14-15, 20-22). The complaint alleged that the discrimination is irrational and violates the equal protection clause of the fourteenth amendment to the United States Constitution. Complaint ¶ 55 (J.A. 21-22). This equal protection claim formed the basis for a claim under 42 U.S.C. §1983. Complaint ¶ 47, 51 (J.A. 18, 20). These claims constitute petitioners' action against the state officials.

(B) The Creation Of The School Lands Trust

The creation of a trust for the support of public schools was a constant part of congressional policy throughout the history of western expansion, beginning with the states carved out of the Northwest Territories and continuing through the admission of Alaska to statehood. Between 1803 and 1962, the United States granted some 78,000,000 acres to newly established states to fund their respective school lands trusts. *Lassen v. Arizona*, 385 U.S. 458, 460 n.3 (1967).

These trusts were created and funded by two distinct groups of acts of Congress: (1) the land sales acts used to dispose of public lands, containing provisions reserving sixteenth sections from sale; and (2) the enabling acts used to admit new states to the Union, requiring the states make certain promises in exchange for receiving the benefits of statehood. Among the benefits of statehood was the school lands trust. Congress began creating the trust through land sales acts and enabling acts in its legislation governing the Northwest Territories.

On May 20, 1785, the Northwest Ordinance was passed, containing the provision: "There shall be reserved the central section of every township, for the maintenance of public schools within the said township." XXVIII Journals of the Continental Congress 298, 301 (1933) (1785 Ordinance for ascertaining the mode of disposing of lands in the western territory)(J.A. 49-50). The 1785 Ordinance became the model for later land sales acts. The reservation of school lands contained in the Ordinance remained a part of the federal policy in dealing with public land throughout the history of western expansion.

The policy of grants for public education expressed in the land sales act was confirmed by its repetition in the enabling acts admitting new states into the Union. Beginning with the enabling act for the first new state formed from the Northwest Territories, the State of Ohio, Congress provided: "[T]he section number 16, in every township, and where such section has been sold, granted or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools." 2 Stat. 173 ch. XL, § 7 (1802)(Ohio Enabling Act)(J.A. 52)[2] In exchange for the school lands trust and other benefits, the State of Ohio agreed not to tax newly patented lands for five years after initial sale. 2 Stat. 173 ch. XL, §7 (1802) (J.A. 52).

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[2]The Ohio enabling act was later amended to provide additional sixteenth sections as Indian treaties made new lands available for survey and sale. 2 Stat. 225 ch. XXI (1803)(J.A. 53).

As this Court recognized in *Andrus v. Utah*, 446 U.S. 500, 507 (1980), enabling acts—beginning with the act for Ohio—were contracts under which the new states made promises to the federal government in return for benefits that included the school lands trust. *See* Hibbard, *A History of the Public Land Policies* at 309-310 (1915) (discusses contract in Ohio's enabling act); Knight, "History and Management of Land Grants for Education in the Northwest Territory," in Vol. I No. 3 *Papers of the American Historical Association* at 27-29 (1885)(same).[3]

When Georgia ceded its claims to lands that are now Alabama and Mississippi, it made as a condition of cession that the territories be governed under the same terms as the Northwest Territory. V *The Territorial Papers of the United States: The Territory of Mississippi, 1798-1817* at 145 (1937)(1802 Georgia Cession)(J.A. 47-49). Following the articles of cession, Congress—on the same day it amended Ohio's enabling act to make additional sixteenth section grants from newly available lands[4]—enacted the Land Sales Act of 1803, which provided for the first public land sales in Mississippi. 2 Stat. 229 ch. XXVII (1803) (J.A. 54-55). Section 12 of the land sales act provided for the sale of the lands "with the exception of the section number sixteen, which shall be reserved in each township for the support of the schools within the same. . . ." 2 Stat. 229 ch. XXVII, § 12 (J.A. 55). The second land sales act for Mississippi contained an essentially identical reservation of sixteenth sections. 3 Stat. 375 ch. LXIII (1817)(J.A. 59).

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[3] Some of the enabling acts, such as that of Ohio, expressly provided that the State receive school lands and other benefits in return for the promises required in the enabling acts. 2 Stat. 173 ch. XL § 7 (1802)(J.A. 52). Others required that the state make return promises for receiving the benefits of statehood, but without enumerating the school lands trust already set out in the land grant statutes. Both forms of enabling acts were contracts creating a school lands trust. Mississippi had the latter form of enabling act.

[4] *Cf.* 11 Annals of Cong. 1097, 1117 (1851)(during discussion in 1802 of the Ohio area of the Northwestern Territories' admission to Union, Mississippi's situation also raised).

The enabling act allowing Mississippi to form a state government was passed in 1817. As with Ohio and other newly admitted states, the enabling act admitting Mississippi to statehood was conditional upon an agreement by the states not to tax newly patented lands for five years. 3 Stat. 348 ch. XXIII (1817)(J.A. 56-58). Mississippi accepted the duties of trustee upon statehood—its first Constitution provided that the school lands would not be sold. Miss. Const. art. VI, § 20 (1817)(J.A. 64).

(C) The Funding and Defunding of the Chickasaw Cession's School Lands Trust

The Chickasaw Cession trust was fully funded by the United States. The lands of the cession remained Indian lands until the Treaty of Pontotoc Creek extinguished Indian title in 1832. Gibson, *The Chickasaws* at 159-160 (1971); Rohrbough, *The Trans-Appalachian Frontier: People, Societies, Institutions, 1775-1850* at 314 (1978). Following the treaty, the public lands in the cession were to be sold under the second Mississippi land sales act of 1817. 3 Stat. 375 ch. LXII (1817)(J.A. 59-60). Although the terms of the land sales act call for reservation of the school lands, the local federal land sales offices nevertheless sold the sixteenth sections in the Chickasaw Cession. Because of this improper sale, the federal government in the late 1830's and early 1840's provided Mississippi with lieu lands for the benefit of the Chickasaw Cession's schools (hereinafter referred to as the "lieu lands"). 5 Stat. 116 ch. CCCLV (1836) (providing for selection of lieu lands by treasury secretary)(J.A. 61); 5 Stat. 490 ch. XL (1842) (amending 1836 act to allow selection of lands by Mississippi Governor)(J.A. 62). These lieu lands consisted of large tracts of land outside the Chickasaw Cession in North Mississippi. Complaint ¶ 29 (J.A. 11-12). Mississippi accepted the lieu lands once they had been selected. 1844 Miss. Laws 238 ch. LXVIII (J.A. 80-81).

After the lieu lands had been held for four years, they were leased for ninety-nine year terms. Although state officials leased the lieu lands and received payments for the leases, the state officials did not pay interest on the

funds received, or even to distribute the income to the beneficiaries of the trust. 1848 Miss. Laws 62 ch. III, § 2 (J.A. 82). While the sale of 174,555 acres was in form a "public auction" with a "minimum price" of six dollars an acre, 1848 Miss. Laws 62 ch. III, §§ 2-3 (J.A. 82-83), they produced $1,047,330.00; a yield of exactly six dollars an acre and not a penny more. State Auditor and Secretary of State of the State of Mississippi *Special Report on Chickasaw Cession School Districts* at 2 (1984) (hereinafter "*Chickasaw Cession Report*") (containing acreage and yield figures).

In 1852, after the state officials were four years into the process of leasing the lieu lands, Congress authorized the state to either sell or lease the lieu lands. In doing so, Congress protected the beneficiaries of the trust in several ways: (1) it required the state as trustee "to invest the money arising from the sales . . . for the use and support of the school . . . and for no other purpose whatsoever"; (2) it required that the lieu lands "shall, in no case be sold or leased without the consent of the inhabitants of such township or district"; and (3) it required that the money realized "be appropriated to use of schools. . . ." 10 Stat. 6 ch. XXXV (1852)(J.A. 63).

The state officials responded by selling the lieu lands at the same price they had been previously leasing the lands. Anyone who had already leased lieu lands was then allowed to convert their leasehold to a fee title by simply applying to the state and paying a clerical fee. 1854 Miss. Laws 348 ch. CCXVII (J.A. 86). Fee titles in trust property were thus given up for no additional consideration. Furthermore, there was no compliance with Congress' express requirements: that consent of the beneficiaries be obtained, that the funds be invested to yield income, and that the funds be turned over for local management. *See* Complaint at ¶ 40 (J.A. 15).

In 1856, the state officials converted the trust funds to uses unconnected with the trust. The funds were to remain in state hands "in the same manner as moneys received

in the state from ordinary sources of revenue." 1856 Miss. Laws 141 ch. LVI, § 1(J.A. 87). The funds were used to obtain internal improvements for the state—they were to be loaned to five railroads for seven years so that the railroads could lay track within the state. 1856 Miss. Laws 141 ch. LVI, §§ 14-15 (J.A. 91). This loan to the railroads was highly speculative. Mississippi's railroads had a long history of extreme economic difficulty. *See* Gonzales, "Flush Times, Depression, War, and Compromise," in I *A History of Mississippi* 284, 289-291 (McClemore ed. 1973)(discussing economic failures of Mississippi's railroads prior to this period); Friedman, *A History of American Law* at 158 (1973)("government promotion of railroads besmirches the era's purity . . ., [and was] a constant undercurrent of state legislation"). The railroads chosen to receive the loans had no history of success and were strapped for funds. For example, the Mississippi Central, within two years of the loan had expended all its loan and stock sale proceeds, yet was still unable to either complete its line or purchase rolling stock. Corliss, *Mainline of Mid-America* at 187-188 (1951).

As the railroad loans began to become due, to avoid default, additional time was allotted for some railroads to pay. 1859 Miss. Laws 193 ch. CXXVIII (J.A. 95). After the Civil War, the railroads either defaulted or made settlements with worthless paper, resulting in an almost total loss. *Chickasaw Cession Report* at 2. At some point after its total conversion of the corpus, the state itself began paying interest at eight percent under the 1856 act. 1856 Miss. Laws 141 ch. LVI, § 1 (J.A. 87). This annual "interest" on the now-lost fund was subsequently reduced to seven percent, 1888 Miss. Laws 43 ch. XXIV (J.A. 96), and then, by the 1890 Mississippi Constitution, to six percent. Miss. Const. art. VIII, § 212 (1890)(J.A. 65). Thus, the trust—once funded by 174,555 acres of land—was converted to a fund of only $1,047,330, which was then completely lost. After the conversion, it "produced" a "remedial" payment by state officials of only $62,191.00 each year, or thirty-six cents an acre. *Chickasaw Cession*

Report at 2-3 (J.A. 37). The state has never repudiated its obligations under the trust.

As noted in a special report by Mississippi's Auditor and Secretary of State, many of the school districts in the Cession are "financially unsound" as a result of the lack of school land funds, and are able to continue viable operations only by operating in violation of state accounting and budgeting laws. If these schools were made to comply with state accounting and budgetary procedures, some might be forced to close. *Chickasaw Cession Report* at 4 (J.A. 39). The Legislative Audit Committee of the Mississippi Legislature proposed that the Chickasaw Cession school districts receive "equitable treatment" through a legislative endowment fund. Legislative Audit Committee, *Report to the Mississippi Legislature: A Special Report on Sixteenth Section Land Management* at 88-92 (1977) (hereinafter "*Legislative Audit Committee Report*"). The state Superintendent of Education appended to the committee report a comment that: "The present procedure is highly discriminatory." *Legislative Audit Committee Report* at 164.

While this action has been pending in the Fifth Circuit Court of Appeals, the Mississippi Legislature in its 1985 session passed "An Act to Provide a Formula for the Determination of the Amount of Funds to be Appropriated Annually into the Chickasaw School Fund. . . ." 1985 Miss. Laws 27 Ch. XXIII (J.A. 97-98).[5] The statute provides that the legislature "shall appropriate" to the State Department of Education a sum of one million dollars to be disbursed to the Chickasaw Cession counties during the year 1985, and further provides for the appropriation of an additional one million dollars for each year until a maximum appropriation of five million dollars for the fiscal year 1989-1990 is achieved. The act also provides that the amount of the appropriation would be cut in any year that it exceeds the average revenue "per teacher unit" received from school lands by the counties in the rest of the state. Further appropriations to carry out the mandate of this statute depend upon the whims of each annual session of the Mississippi Legislature.[6] Nor will the appropriation, if made, achieve the amount required *as of 1983* to place the Chickasaw Cession counties on a par with the remaining fifty-nine counties in the State. *Chicksaw Cession Report* at 3 (J.A. 38).

[5] In recent years the Mississippi Legislature has become accustomed to responding affirmatively, albeit inadequately, to litigation in both the federal and state courts. *See Gates v. Collier*, 616 F.2d 1268, 1280 (5th Cir. 1980)(prompted legislature to remedy unconstitutional conditions in state prisons); *State Tax Commission v. Fondren*, 387 So. 2d 712, 724-26 (Miss. 1980)(forced reassessment of real property throughout state in response to constitutional mandate).

Before the 1985 legislation, the schools of the Chickasaw Cession received about 63¢ per pupil and 36¢ per acre in payments in lieu of trust income, while the non-Chickasaw Counties averaged $75.34 per pupil and $42.00 per acre. The receipts for an average county outside the cession were $172,856.00, while the receipts for an average county within the cession were $2,704.00. *Chickasaw Cession Report* at 3 (J.A. 37). The 1985 legislation provides for fiscal year 1985-1986 about $10.75 per each of the 99,163 schoolchildren, or $6.11 for each of the 174,555 acres that should be in the trust.[7] In 1984, the fifty-nine counties outside the Chickasaw Cession received $75.34 per pupil and $42.00 per acre. *Chickasaw Cession Report* at 10. The percentage increase in income from school lands outside the Chickasaw Cession was 467 percent from 1978 to 1983, *Chickasaw Cession Report* at 3 (J.A. 37). This increase will, if anything, grow larger given the recent beginning of a serious effort by state officials to obtain at least an approximation of market value incomes from sixteenth sections still within the trust. *See Turney v. Marion County Board of Education*, No. 55,764 slip op. at 8-9, 19 (Miss.

[6] The Constitution of the State of Mississippi, requires such appropriations to be made by each annual session of the legislature. Miss. Const. art. VIII, § 212 (1890)(J.A. 65)

[7] The acreage figure and the number of pupils are given in *Chickasaw Cession Report* at 2, 10 (J.A. 36, 44).

Nov. 27, 1985)(holding sixteenth section leases for inadequate consideration are to be reformed to yield market value). The *Chickasaw Cession Report* states that a minimum of $7,000,000.00 per annum is required to put the Chickasaw Cession schools on a par with the school lands trust income received by the other fifty-nine counties. *Chickasaw Cession Report* at 3 (J.A. 37-38). The legislative goal of "equitable compensation" for the Chickasaw Cession for the loss of its trust fund will not be attained by the 1985 legislation.

SUMMARY OF THE ARGUMENT

This suit seeks enforcement of the federal school lands trust for the schools of Mississippi's Chickasaw Cession. The Chickasaw Cession school lands trust is breached annually by the state officials charged with the duties of trustee who refuse to pay income to the schools of the Chickasaw Cession commensurate with the obligations imposed by the trust. These state officials will continue to breach the trust in that manner unless enjoined. The issue *sub judice* is whether a federal court may enjoin continuing breaches of a federal school lands trust by state officials who: (1) Through their predecessors, gave away or converted to the use of the state over 177,000 acres of school lands conveyed in trust by the federal government to the state for the sole benefit of the Chickasaw Cession schools; (2) Themselves, continue to acknowledge the defalcations as well as their perpetual fiduciary duty to provide trust income commensurate with what would have accrued had there been no defalcations; (3) Despite such acknowledgments, themselves, continue to default on income payments annually, while providing a miniscule sum of money in the form of an annual appropriation in lieu of the trust income to which the Chickasaw Cession schools are entitled; and (4) Themselves, allow the entire income from school lands remaining in the state to be retained by the Mississippi Counties outside the Chickasaw Cession.

The federal school trusts were conceived by Congress as the basis for the creation and continued support of the public schools of each public land state. Federal school lands trusts began as and remain the corner-stone of the system of free public schools in a substantial majority of the states. *United States v. Morrison*, 240 U.S. 192, 198 n.1&2 (1915); *Cooper v. Roberts*, 59 U.S. (18 How.) 173, 177 (1855). For these reasons these trusts constitute an area of high federal interest.

All federally-created school trusts are uniformly governed by federal law and share significant characteristics. The trusts exist perpetually, cannot be altered or abrogated by the states, and are for the sole benefit of the public schools. *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 302-03 (1976); *Lassen v. Arizona*, 385 U.S 458, 462-463, 467 (1967). School lands trusts impose specific burdens and obligations on the states, as well as the state officials who act as trustees, which include preserving the corpus, maximizing income, and, where the corpus is lost or converted wrongfully, continuing the payment of appropriate income indefinitely. The obligations and duties, first imposed in the various federal statutes which created the trust, are further defined by the common-law. The grants—including the Chickasaw Cession grant—are enforceable in the same manner as common-law trusts: *See infra* § I(F). The federal courts have jurisdiction as well as the duty to require the public officials of Mississippi to carry out the school lands trust in accordance with its terms.

The school lands trust and land grants generally, are clearly contractual, as has long been recognized. *Andrus v. Utah*, 446 U.S. 500, 507 (1980); *Wood v. Lovett*, 313 U.S. 362, 369 (1941); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137 (1810).

The state officials' violation of the trust duties constitutes a violation of these contract obligationsThe only justifications or explanations offered for these breaches are (1) historical accident and (2) the structure of school fi-

nances. These excuses are neither a reasonable nor a necessary basis for the state's wrongful acts. The Chickasaw Cession schoolchildren are entitled to injunctive relief to prevent this indefensible conduct in the future.

The principal thrust of this lawsuit seeks an injunction to prevent state officials from continuing into the future their annual violations of their trustee duties. Such suits against state officials who violate federal law are authorized by *Ex parte Young*, 209 U.S. 123 (1908). Prospective injunctive relief to prohibit continuing violations of federal law in the future is sanctioned by *Edelman v. Jordan*, 415 U.S. 651 (1974). Such prospective relief is permissible even if it has an "ancillary effect on the state treasury." The Chickasaw Cession schoolchildren are clearly entitled to this *Edelman*-type relief.

Another aspect of the Complaint seeks relief of the nature approved in *Milliken v. Bradley*, 433 U.S. 267 (1977). Under *Milliken*, remedial programs to cure the present effects of past discrimination are permissible within the strictures of the eleventh amendment. Suffering a disadvantage similar to the schoolchildren in *Milliken*, the Chickasaw Cession schoolchildren are entitled to remedial programs to cure present effects of the continuing discrimination by state officials.

The discriminatory acts perpetuated by the state officials cannot survive the thorough analysis required by rational basis review as set forth by this Court in *Cleburne v. Cleburne Living Center*, ___ U.S. ___, 87 L.Ed.2d 313 (1985). The failure of the Fifth Circuit to make the analysis required by *Cleburne* led the Court into the erroneous conclusion that the discriminatory acts of the state officials have a rational basis. Performance of the required analysis demonstrates: (1) the Chickasaw Cession schoolchildren are victims of deliberate discriminatory acts by state officials who arbitrarily divide the schoolchildren of the state into two groups and deny those schoolchildren of the Chickasaw Cession school lands trust income; and (2) the discriminatory acts of the state officials deny the Chickasaw Cession schoolchildren minimally adequate education.

This case warrants intermediate scrutiny. The Fifth Circuit erroneously held that an absolute deprivation of all educational opportunities was prerequisite to the invocation of intermediate scrutiny on the theory that such was the rule in *Plyler*. Thus a partial discriminatory denial of educational opportunity so severe as to deprive schoolchildren of a minimally adequate education is said to pass constitutional muster. The discrimination imposed on the Chickasaw Cession schoolchildren is homologous with that in *Plyler v. Doe*, 457 U.S. 202 (1982) and altogether distinct from the funding differential issue described in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

ARGUMENT

I. THE FEDERALLY-CREATED SCHOOL LANDS TRUST IS ENFORCEABLE IN THE FEDERAL COURTS AGAINST STATE OFFICIALS WHO BREACH THEIR DUTIES AS TRUSTEE

A. The Chickasaw Cession Schoolchildren Have Stated A Claim Against State Officials For Their Continuing Breach Of The School Lands Trust

The state officials are committing a continuing breach of their duties as trustees of the Chickasaw Cession's federal school lands trust. This continuing breach began with the trustees' conversion of the entire trust corpus and continues with their present refusal to provide the schoolchildren of the Chickasaw Cession with the level of benefits commensurate with the obligations of the trust. Common law rules governing trusts recognize the wrongful nature of this conduct, as well as the trustee's duty to cease the continuing violation.

Common law trust principles proscribe the defalcations and continuing breaches that have occurred. Under federal common law principles, this Court has enforced school lands trusts in *Lassen* and *Alamo*. The Mississippi school lands trust is likewise enforceable because the Mississippi

trust, and all other public-land school trusts, partake of the same essential nature and proceed from the same fundamental principle. That all the school land trusts partake of the same nature is convincingly demonstrated by the legislative history of the school lands grants, the policy underlying all school lands trusts, and the prior holdings of this Court.

B. All School Lands Trusts Are Founded On The Same Fundamental Principle

Congress was following a fundamental policy of creating trusts for the purpose of encouraging and supporting public education when it created the school lands trust in Mississippi and other public-lands states:

> The practice of setting apart section no. 16 of every township of public lands, for the maintenance of public schools, is traceable to the ordinance of 1785, being the first enactment for the disposal by sale of the public lands in the western territory. The appropriation of public lands for that object became a *fundamental principle*, by the ordinance of 1787, which settled terms of *compact* between the people and States of the northwestern territory, and the original States, unalterable except by consent.

-*Cooper v. Roberts*, 59 U.S. (18 How.) 173, 177 (1855) (emphasis added); *see Andrus v. Utah*, 446 U.S. 500, 506 n.7 (1980)(citing Cooper); *United States v.Morrison*, 240 U.S. 192, 198 (1915)(same).

The Georgia Cession—which ceded to the United States the area that became Mississippi—and Mississippi's land sales and enabling acts embodied this fundamental principle by incorporating by reference the Ordinances of 1785 and 1787. Once announced in the Ordinances, this fundamental principle continued as the uniform policy and purpose structuring all subsequent school lands trusts.

> The first enactment for the sale of public lands in the western territory provided for setting apart section sixteen of every township for the maintenance of public schools (ordinance of 1785); *Cooper v. Roberts*, 18 How. 173, 177, 15 L.Ed. 338, 339; and *in carrying out this policy, grants were made for common-school purposes to each of the public-land states admitted to the Union*. Between the years 1802 and 1846 the grants were of every section sixteen and, thereafter, of sections sixteen and thirty-six. [footnotes omitted]

-*United States v. Morrison*, 240 U.S. 192, 198 (1916)(footnotes cite to grants for twenty-nine states) (emphasis added); *Andrus v. Utah*, 446 U.S. 500, 506 n.7 (1980)(quoting *Morrison*); *United States v. Wyoming*, 331 U.S. 440, 443 (1947)(same).

The homogeneity of the policy underlying the school lands trusts of the various states is in accord with the general federal "equal footing" policy to which specific reference is made in the enabling acts for states.

> [T]he cession by the State of Georgia to the United States in 1802 of territory including great part of Alabama and of Mississippi, each provided that the territory so ceded should be formed into states, to be admitted, on attaining a certain population, into the Union...(in the words of the Ordinance of Congress of July 13, 1787, for the government of the Northwest Territory, adopted in the Georgia cession) "on an equal footing with the original States in all respects whatever;"....

-*Shively v. Bowlby*, 152 U.S. 1, 26 (1894)(citing *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 221-22 (1845)); *see also California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 281 n.9 (1982) (citing *Shively* and *Pollard* with approval).

Ervien v. United States, 251 U.S. 41 (1919), a school lands trust case, makes special mention of the "equal footing" doctrine indicating that interpretation of the school lands trust should receive a single interpretation for all states. 251 U.S. at 45; *see* 11 Annals of Cong. 1097-1100 (1851)(in

1802, while discussing the Northwestern Territory's admission to the Union, both equal footing and school lands trust principles are invoked).

The specific school lands trust provisions vary from state to state. The later grants contain more specific provisions. Despite this additional verbiage, even the later grants are not comprehensive statutes. *Cf. County of Oneida, New York v. Oneida Indian Nation*, ___ U.S. ___, 84 L.Ed.2d 169, 181 (1985)(trust "did not establish a comprehensive remedial plan for dealing with violations"). Given that none of the school lands statutes were comprehensive, this Court has held that the purpose underlying these grants, rather than the specific language of the grants, is the touchstone for construing the acts creating the trusts.

> The Act's silence obliges us to examine its purposes, as evidenced by its terms and its legislative history, to determine whether these restrictions should be imposed here.

-Lassen, 385 U.S. at 462-63 (construing Arizona's enabling act which was one of the most specific).

While non-comprehensive, each individual grant proceeded from the same underlying policy. Prior school land legislation, as the source for this grant, is an important index of its meaning. Later grants are an equally important index under the accepted rule of construction that subsequent legislation can be used to construe earlier legislation.[8] For example, the construction this Court placed on the school land grant in *Lassen v. Arizona* is equally applicable to the Mississippi school land grant.

This Court has recognized that both the earlier and later grants are of the same genre. *United States v. Wyoming*,

[8] *See Heckler v. Turner*, ___ U.S. ___, 84 L.Ed.2d 138, 156-57 (1985)(subsequent legislation carries "considerable retrospective weight"); *Chrysler Corp. v. Brown*, 441 U.S. 281, 299-300 (1979)(subsequent legislation sheds "light on the intent"); *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)(subsequent legislation "entitled to significant weight"); *F.H.A. v. Darlington, Inc.*, 358 U.S. 84, 90 (1958)(subsequent legislation "entitled to weight").

331 U.S. at 451 (notes that the House Committee Report for the Wyoming Enabling Act, stated Wyoming would receive "the usual land grants"); *see* S. Rep. No. 185, 82d Cong., 1st Sess. at 708 (1951) (Mississippi and its Enabling Act included with 32 other public-land states in an appendix table entitled "Acts Containing Other Provisions Restricting Transfers Of Land To, Or Disposal By, The States"); S. Rep. 454, 61st Cong., 2d Sess. at 19 (1910)(more specific restrictions regarding school lands placed in New Mexico's and Arizona's Enabling Acts were "nothing new in principle"). The greater specificity of the later grants is only an additional prophylactic measure taken by Congress.

> To preclude any license of construction or liberties of inference it was declared that the disposition of any of the lands or of the money or anything of value directly or indirectly derived therefrom for any object other than the enumerated ones should "be deemed a breach of trust."

-Ervien, 251 U.S. at 47.

In short, the specificity of the grant was simply a change aimed at preventing repetition of the rampant abuses of the past:

> All these restrictions in combination indicate Congress' concern both that the *grants* provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust.
>
> This is confirmed by the *background* and legislative history of the Enabling Act. The restrictions placed upon land *grants* to the States became steadily more rigid and specific in the 50 years prior to [Arizona's] Act, as Congress sought to require prudent management and thereby to preserve the usefulness of the *grants* for their intended purposes.

Lassen v. Arizona, 385 U.S. 458, 467, 468 (1967) (despite the fact that only *one grant* was at issue, the Court speaks of *all* grants)(emphasis added); *see Alamo*, 424 U.S. at 302 (quoting *Lassen*).

C. The Common Thread That Runs Through The Cases Construing Each Of These Grants Is A Clear Recognition of Enforceability

State officials are made to account for the discharge of their duties as trustees. This Court necessarily recognized this fact in enforcing the trusts in *Lassen* and *Alamo*.[9] Given that all school lands trust partake of the same nature, the particular provisions used by Congress to create a trust do not affect its enforceability. The Mississippi school lands trust is just as enforceable as the Arizona school lands trust enforced in *Lassen*.

The federal courts, applying federal law to construe the various acts of Congress creating the school lands trusts, have characterized these trusts as irrevocable compacts between the United States and the state for the benefit of the common schools. These trusts cannot altered or abrogated, and are enforceable much as common law trusts. In *Lassen*, this Court states with reference to the language in the Arizona enabling act:

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[9]Despite the wealth of authority heretofore cited demonstrating the existence and enforceability of the federal school lands trust, there is some language in *Alabama v. Schmidt*, 232 U.S. 168 (1914), which, in the lower courts, state officials contended was to the contrary. That language characterized the school lands trust as "honorary". 232 U.S. at 174. State officials take this "honorary" characterization to mean that the trust is unenforceable. This notion that "honorary"—as used in *Schmidt*—can be equated with unenforceability is erroneous. *See* S. Rep. No. 185, 82d Cong. 1st Sess. at 7 (1957)(Alabama and its Enabling Act included in appendix table entitled "Acts Containing Other Provisions Restricting Transfers Of Land To, Or Disposal By, The States"). This action is based upon a failure to distinguish between a state's honorary obligation to retain the specific school land granted instead of converting them to a trust fund, and a state's binding obligation to properly manage the overall assets of the trust regardless of their form.

> "Words more clearly designed. . .to create definite and specific trusts and to make them in all respects separate and independent of each other could hardly have been chosen." *United States v. Ervien*, 246 F. 277, 279. All these restrictions in combination indicate Congress' concern both that the grants provide the most substantial support possible to the beneficiaries and that only the beneficiaries profit from the trust.

385 U.S. at 468.

There is nothing to suggest that the Congress had less than this intent when it passed Mississippi's Enabling Act in 1817. In *United States v. Swope*, 16 F.2d 215 (8th Cir. 1926), the court, after characterizing the grant as an express trust, states:

> "The trust was imposed on New Mexico by the act of Congress, but the same rule of construction applies to both public and private grants. "The best construction of a statute is to construe it as near to the rule and reason of the common law as may be, and by the course which that observes in other cases. . . ."

16 F.2d at 217.

Throughout the years, the Mississippi Supreme Court has continued to declare that the compact between the United States and the State of Mississippi constitutes a valid, subsisting and enforceable trust, and has insisted upon its strict enforcement.[10] Other state courts, construing federal land grants, uniformly hold that valid, subsisting, and bind-

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[10]*See Bragg v. Carter*, 367 So. 2d 165, 167 (Miss. 1978) (school lands trust clearly enforceable); *Tally v. Board of Supervisors*, 323 So. 2d 547, 550 (Miss. 1975)(same); *Holmes v. Jones*, 318 So. 2d 865, 868 (Miss. 1975)(same); Keys v. Carter, 318 So. 2d 862, 864 (Miss. 1975)(same); *State ex rel. Kyle v. Dear*, 209 Miss. 268, 279-80, 46 So. 2d 100, 104 (1980)(same); *Koonce v. Board of Supervisors*, 202 Miss. 473, 478, 32 So. 2d 264, 265 (1941)(same).

ing trusts were created.[11] This Court should erase any doubt that may exist as to the nature, purpose, intent and obligations of the school land trusts.

D. The Claims Arising From These Federally-Created Trusts Are Federal Claims Governed By Federal Law

As suggested in *Lassen*, the issue whether the lands trusts are governed by federal law transcends this suit. It would defeat the purpose of Congress in creating the school lands trust to allow their enforcement to depend on the tender mercies of the states where the trusts exist. Beginning with the defalcation imposed on the Chickasaw Cession schoolchildren by Mississippi, continuing through the relatively innocent boondoggle described by this Court in *Lassen*, considering the 100,000 acre land grab attempted by Alaska described in *State v. Weiss*, 706 P.2d 681 (Alaska 1985), and going on through the 25 acre defalcation perpetrated by the State of Hawaii as described in *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 588 F.2d 1216 (9th Cir. 1979), the state trustees seldom hesitate to ignore, misconstrue and violate the express terms of the federal land trusts by legislative fiat or otherwise.

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[11] Alaska: *State v. Weiss*, 706 P.2d 681, 683 (Alaska 1985)(enforcing federally-created mental health lands trust); *State v. University of Alaska*, 624 P.2d 807, 810 (Alaska 1981)(enforcing federally-created university lands trust); Arkansas: *Special School District No. 5 v. State*, 139 Ark. 263 213 S.W. 961, 962-64 (1941) (enforcing federally-created school lands trust); Arizona: *Murphy v. State*, 65 Ariz. 338, 181 P.2d 336, 340, 346, 354 (1947) (enforcing federally-created school lands trust); Idaho: *Roach v. Goodling*, 11 Idaho 244, 81 P. 642, 644-45 (1905) (enforcing federally-created college lands trust); Nebraska: *State v. Rosenberger*, 183 Neb. 726, 193 N.W.2d 769, 773 (1972) (enforcing federally-created school lands trust); North Dakota: *State Highway Commission v. State*, 70 N.D. 673, 297 N.W. 194, 195-96 (1941) (enforcing federally-created school lands trust); Oklahoma: *Oklahoma Education Association v. Nigh*, 642 P.2d 230, 235-36 (Okla. 1982) (enforcing federally-created school lands trust); Utah: *Duchesne v. State Tax Commission*, 1040 Utah 365, 140 P.2d 335, 337-38 (1943) (enforcing federally-created school lands trust).

It must be remembered that a school land grant is a "solemn agreement"[12] and "compact"[13] between the state and the federal government. Having this nascence, and considering the alternative, the trust is necessarily a creature of federal law.[14]

> Although the terms of these grants differ, at least the most recent commonly make clear that the United States has a continuing interest in the administration of both the lands and the funds which derive from them.
>
> *-Lassen v. Arizona*, 385 U.S. 458, 460 (1967).

In a recent decision by a court of appeals on this issue, the Ninth Circuit determined federal law governed rights in the land trust for native Hawaiians incorporated in the Admission or Enabling Act for the State of Hawaii:

> While the management and disposition of the home lands was given over to the state of Hawaii with the incorporation of the Commission Act into the state constitution, the trust obligation is rooted in federal law, and power to enforce that obligation is contained in federal law, *see Keau-*

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[12] As *Andrus v. Utah* correctly emphasizes, "the school land grant was a 'solemn agreement' which in some ways may be analogized to a contract between private parties." 446 U.S. at 507-08 (also speaks of "as is typical of private contract remedies");

[13] *See United States v. Morrison*, 240 U.S. at 201 (school land grant part of a "compact"); *Cooper v. Roberts* 59 U.S. (18 How.) at 178, 181 (same).

[14] *See Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 301 (1976)(quoting *Lassen* regarding the continuing interest in the federal school lands trust); *United States v. Swope*, 16 F.2d 215, 217 (8th Cir. 1926)(federal government imposed the school lands trust upon the state); *State v. Weiss*, 706 P.2d 681, 683 (Alaska 1985)(federally imposed trust governed by federal trust law); *Oklahoma Educational Association, Inc. v. Nigh*, 642 P.2d 230, 235-36 (Okla. 1982)(state legislature powerless to alter obligations under federal trust); *State v. University of Alaska*, 624 P.2d 807, 810-11 (Alaska 1981)(federal trust enforced by federal law).

> *kaha I*, 588 F.2d at 1218. Congress imposed the trust obligation as a condition of statehood and as a 'compact with the United States.' § 4, 73 Stat. 4. In *Pennhurst*, the right relied on was created completely by state law and only by state law.

Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 739 F.2d 1467, 1472 (9th Cir. 1984); *cf*: *Barnes v. Cohen*, 749 F.2d 1009, 1018)(3d Cir. 1984) (where both federal and state law are being violated a federal court can enjoin both violations).

E. The Federal Law Of Trusts Proscribes The State Officials Continuing Misconduct As Trustees

Common law rules of construction applied to private trusts are applied to the public school lands trust. *United States v. Swope*, 16 F.2d 215, 217 (8th Cir. 1926). Common law rules of trust law have been applied to federal lands trusts in various contexts. *See County of Oneida, New York v. Oneida Indian Nations*, ___ U.S. ___, 84 L.Ed.2d 169, 178-180, 181, 186-187 (1985)(applying common law remedies in action under Non-Intercourse Act of 1793 because the act did not establish comprehensive remedial plan).

The common law rule that trustees are prohibited from giving away, appropriating to their own use, or otherwise disposing of the corpus of a trust in derogation of the rights of the beneficiaries applies to the school lands trust.[15] One important corollary of the rule is the continuing nature of the trustee's duty to pay income to the beneficiaries once such a defalcation occurs. Where a reasonable

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[15]*See State v. Weiss*, 706 P.2d 681, 683 (Alaska 1985)(relying on *Restatement (Second) of Trusts* (1959) when protecting a federally-created land trust); *State v. University of Alaska*, 624 P.2d 807, 813 (Alaska 1981)(relying on Scott, *The Law of Trusts*, (3d ed. 1967) and Bogert, *The Law of Trusts and Trustees* (rev. 2d ed. 1978) when protecting a federally-created land trust); *Holmes v. Jones*, 318 So. 2d 865, 868-69 (Miss. 1975)(same).

yield is prevented by the trustee's wrongful conduct, the trustee has a continuing duty to produce a reasonable yield. Bogert, *Trusts & Trustees* § 703 (2d rev.ed. 1982). The defaulting trustee and its agents have "pocketed" the corpus of the Chickasaw Cession trust. The continuing duty of these trustees simply requires them to pay for what they hold in their pockets. 4 Pomeroy's Equity Jurisprudence §§ 1067, 1080 (5th ed. 1941); *Restatement (Second) of Trusts* § 74 comment c (1959). They are not allowed to avoid the duty to pay because the defalcation occurred in the past. IV Scott, *The Law of Trusts* § 392 (3d ed. 1967). The continuing duty to pay a reasonable yield remains. A failure to pay such a yield is a present breach of fiduciary duty.

Unless a clear and unequivocal repudiation of the trust is exhibited by the trustee, this continuing duty does not abate nor do limitations run against a beneficiary's right to recover against the trustee. Mere mismanagement will not constitute such a repudiation. *See Benedict v. New York*, 250 U.S. 321, 327 (1918)(no limitations until repudiation); *Gisborn v. Charter Oak Life Insurance Co.*, 142 U.S. 326, 337-38 (1892)(same); *Loring v. Palmer*, 118 U.S. 321, 344-46 (1885)(only "actual abandonment" of trustee's duties would cause beneficiaries' claim to abate or be subject to limitations); *Phillippi v. Phillipe*, 115 U.S. 151, 159 (1884)("lapse of time can constitute no bar to relief"); *Lewis v. Hawkins*, 90 U.S. (23 Wall.) 119, 126 (1874)("The relation once established is presumed to continue unless a distinct denial...[is] clearly shown"); *Nemkov v. O'Hare Chicago Corp.*, 592 F.2d 351, 356 (7th Cir. 1979)(citing *Lewis v. Hawkins*).

In this suit, state officials, acting as trustees, committed an act of defalcation when they gave away the remainder interest in the Chickasaw Cession lieu lands. *See* 1854 Miss. Laws 348 ch. CCXVII, § 2(J.A. 84). A further defalcation occurred when the trustees loaned a substantial part of the proceeds of the sales of the leases and of the lieu lands to various enterprises to use in the building of the railroads. 1856 Miss. Laws 141 ch. LVI, §§ 1, 14 (J.A.

87, 91). Another defalcation occurred when the trustees acquiesced in the appropriation of the balance of the trust fund into the general funds of the state where they were "subject to the general appropriation, by law, from the treasurer, or otherwise to be used by the state, in the same manner as the moneys received into the state from the ordinary sources of revenue." 1856 Miss. Laws 141 ch. LVI §§ 1, 14 (J.A. 87, 91).[16] From the instant these wrongful acts occurred, the state and its officials became trustees *de son tort*. That these defalcations occurred in the distant past detracts not an iota from the obligations of the trustees. This is so because the state has never repudiated the trust but rather it has continued to recognize its obligation to pay income to the Chickasaw Cession schools to the present day.

Thus, while the state officials and the state have repeatedly acknowledged their continuing trust obligations, the duties imposed by the trust have continued to be breached on an annual basis. By refusing to pay income to the beneficiaries in any way commensurate with the size of the converted corpus, or comparable with the trust income enjoyed by the counties whose sixteenth section land was not converted by the state, the trust is breached.

At least one of the state officials has candidly confessed that he and the state are guilty as charged in the complaint filed in this suit. In November, 1984, while this suit was

[16]According to the report, in 1856, the state converted to its own use part of the $1,047,330.00 received for 174,555 acres of Chickasaw Cession lieu lands between 1848 and 1856, which until that point had been held in trust by the state. In 1860, the state completed the conversion of the balance of the fund which had been loaned to certain enterprises that had promised to build railroads. Most of the Chickasaw Cession lieu land was in the Mississippi Delta, where exists some of the richest farm land in the world. To arrive at some concept of the present value of the property, without departing from the record, Bolivar County, where a substantial part of the lieu land was located, realized income of $94.25 per acre for its sixteenth section land in fiscal year 1983, while the Chickasaw Cession counties were paid 36¢ per acre in lieu of income for the purloined lieu lands. *Chickasaw Cession Report* at 2 (J.A. 36).

pending in the Fifth Circuit, Richard Molpus, Mississippi's Secretary of State and a defendant in this suit,[17] and Ray Mabus, Mississippi's State Auditor, prepared a special report on the Chickasaw Cession School Districts. *Chickasaw Cession Report* (J.A. 34). Comparing the sixteenth section receipts in the fifty-nine counties having school lands with payments to the counties in the Chickasaw Cession for the 1983 fiscal year, the report concluded with this finding:

> If a similar level of support were available to the Chickasaw Cession counties as was available to the average sixteenth section area counties, over $7,000,000.00 in additional funding would be needed. Raising the per acre proceeds to the sixteenth section per acre average of $42.00 would cost $7,022,502.00. Employing a similar methodology to the per student shortfall would cost $7,408,468.00.
>
> -*Chickasaw Cession Report* at 3 (J.A. 38).

It is the continuing and recurring breach of trust, as measured by one of the principal state officials, for which relief is sought in this suit.

In its 1985 session, the Mississippi Legislature, while this suit was before the Fifth Circuit, attempted to respond to the realities of the state's defalcations for the first time since the 1890 Constitution. 1985 Miss. Laws 27 ch. XXIII, § 1. The act piously recites: "It is the intent of the Legislature to increase the annual appropriations to the Chickasaw Counties in order to equitably compensate them for each acre of Sixteenth Section Land which they have lost through sale by the state". 1985 Miss. Laws 27 ch. XXIII, § 2 (J.A. 97). However, the act demonstrates on its face that it will never accomplish its aim. For the fiscal year 1985-1986, the statute appropriates an additional $1,000,000.00 for the Chickasaw Cession Schools. By the provisions of the act itself (which provides for an appro-

[17]The Secretary of State is charged with the administration of the school lands trust.

priation of $5,000,000.00 in fiscal year 1989-1990),[18] the appropriation begins $4,000,000.00 per annum short of the trust income to which the legislation itself admits Chickasaw Cession schools are entitled. Accepting the even more candid admissions of Secretary of State Molpus, the initial shortage is $6,000,000.00 per annum.

Considered in the light of the total lack of response by the trustees of the school lands trust to the plight of the Chickasaw Cession schools for over 130 years, the token effort just described is important to this suit in only one respect. By legislative act, the State of Mississippi has admitted its obligation to provide the Chickasaw Cession schoolchildren with trust income commensurate to the school lands trust income enjoyed by the remaining fifty-nine counties in the state. But the same legislation demonstrates the continuing failure and refusal to comply with the obligations of the trust. The need for the relief sought in this suit is thus underscored.

II. WITHOUT REASON OR NECESSITY, STATE OFFICIALS COMMIT A CONTINUING BREACH OF CONTRACT OBLIGATIONS IMPOSED BY THE FEDERAL SCHOOL LANDS TRUST COMPACT

A. State Officials Have Impaired The Contractual Obligations They Owe To The Chickasaw Cession Schoolchildren.

The schoolchildren of the Chickasaw Cession are the intended beneficiaries of a promise by the State of Mississippi to maintain the school lands trust. As with other public-land states, the United States agreed to fund the school lands trust in Mississippi in exchange for return promises by the State that included an agreement not to tax public lands for five years after sale. *See supra* note 3 and accompanying text. As with other types of trusts, the state officials, by undertaking the duties of trustee,

[18] This is a goal to be reached only if the 1989 legislature chooses to make the appropriation, which it is in no way bound to do.

promised the grantor (the United States) and the beneficiaries (the schoolchildren) to fulfill the legal obligations of a trustee. *See supra* § I(E). This contract obligation and its breach by the state officials forms the basis of the claim under the contracts clause of the United States Constitution in this case.

The contract here originates in a grant of lands by the United States. The contractual nature of land grants has long been recognized. *Wood v. Lovett*, 313 U.S. 362, 369 (1941); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137 (1810). The contractual nature of the school lands trust is equally well-recognized. As long ago as 1855, this Court characterized the school land grant to Michigan as a "compact" between Michigan and the United States. *Cooper v. Roberts*, 59 U.S. (18 How.) 173, 176 (1855). In *Andrus v. Utah*, 446 U.S. 500 (1980), this Court noted that "[T]he school land grant was a 'solemn agreement' which in some ways may be analogized to a contract between private parties." *Andrus*, 446 U.S. at 507.

State officials agreed to undertake the duties of trustee as defined by the laws of trust, and then breached those duties. *See supra* § I(E). These duties imposed on the State by common law rules defining the duties of trustee are obligations protected by the contracts clause. The "obligations of contract" include the relevant rules of law that govern the terms of the grant. *Wood*, 313 U.S. at 370; *see United States Trust Co. v. New Jersey*, 431 U.S. 1, 20 n.17 (1977)("The obligations of a contract long have been regarded as including . . . law pertaining to interpretation and enforcement . . . as if they were expressly referred to or incorporated in its terms").

As defaulting trustees, the state officials are under a continuing duty to provide the trust with an income equivalent to that which it would receive if the trust's corpus were whole. *See supra* § I(E). The continuing failure of the state officials to provide the schoolchildren as beneficiaries with such an income is, and will continue to be, a substantial impairment of the contractual obligations of

the State of Mississippi. This "partial" impairment[19] is a substantial one. Having no corpus, the Chickasaw Cession counties receive no income from the trust and receive payments in lieu of income that are a fraction of the income received in the counties outside the cession. These conditions exist because of the state officials' disregard of their continuing duties to the trust and its beneficiaries.

B. The Impairment By State Officials Of Their Contractual Obligations Is Not "Reasonable and Necessary"

Where the State has impaired obligations of contract, the legislation must be "prompted by. . .[a] significant and legitimate state interest" to escape the prohibition of the contract clause. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 416 (1983). This means the state must show the reasonableness and necessity of the impairment:

> The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is *reasonable and necessary* to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised.
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> -*United States Trust Co.*, 431 U.S. at 25-26 (emphasis added and footnotes omitted); *see also Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 243-44 (1978)(citing *United States Trust Co.*

[19]It matters not whether this Court considers the breach a total impairment, or—because of the pittance being doled out to the Cession's schools—a partial impairment. Partial impairments of contract obligations violate the prohibition of the clause just as total impairments. *United States Trust Co.*, 431 U.S. at 26-27.

> for the "reasonable and necessary" principle as well as "more stringent examination" for a state's own contract).

To decide whether the "legitimate state interest" test is met, the court first examines the purpose of the legislation to determine whether it serves an important public purpose. If an important public purpose is discerned, the court then examines whether the means chosen are "reasonable and necessary" to accomplishment of the purpose. *United States Trust Co.*, 431 U.S at 26; *see Energy Reserves*, 459 U.S. at 416-417 (applying two-part analysis of purpose). When the state itself is a party to the contract, a "stricter standard" applies. *Energy Reserves*, 459 U.S at 412 n.14. The Court noted that with at least one type of contract—state financial obligations—this stricter standard is nearly always fatal to a state's impairment of contract:

> When a state itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets. *See United States Trust Co.*, 431 U.S. at 25-28; *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935); *Murray v. Charleston*, 96 U.S 432 (1878). *But see Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502 (1942).
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> -*Energy Reserves*, 459 U.S. at 412 n.14.

The lower court advanced two explanations for Mississippi State officials' conduct. One was that the "income difference is attributed to historical fact[s]" for which the state has made a partial remedy. *Papasan*, 756 F.2d at 1095 (P.A. A-30-31).[20] It is clear, however, that the income difference is attributable solely to the state officials' breach of their duty to provide the trust with a reasonable income. *See supra* § 1(E). Neither historical occurrences involved

[20]These justifications were stated in terms of rational bases in response to the equal protection claim.

in this case nor the mere passage of time since the beginning of the breaches excuse the continuing breach by the state officials.[21] A continuing failure to give the Chickasaw Cession schoolchildren the benefits of a properly managed trust cannot be a "reasonable and necessary" response to an "important public purpose" when the "purpose" is simply to excuse state officials who have frittered away the corpus of the trust. A state is not free to rewrite the terms of its contracts to suit economic convenience:

> If a state could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all. [footnote omitted]
>
> -*United States Trust Co.*, 431 U.S. at 26.

The second purported rationale noted by the Fifth Circuit for the state officials' conduct is that of Mississippi's "structure of school finances." *Papasan*, 756 F.2d at 1095 (J.A. 30). The Fifth Circuit stated that:

> With land values as a base and desired local administration of local schools, income differences are inevitable.
>
> -*Papasan*, 756 F.2d at 1095. (P.A. A-30)

These assertions regarding the structure of Mississippi school finances are factually incorrect[22] for several reasons. The state officials have always exercised direct and complete control over the Chickasaw Cessions' school lands. Although some aspects of sixteenth section land management are delegated locally outside the Chickasaw Cession, no aspect of school lands administration in the Chickasaw Cession has ever been performed locally. In fact, the officials failed to obtain consent for their actions from any local school officials or the trust beneficiaries, even though such consent was expressly required by Congress. 10 Stat. 6 ch. XXXV (1852)(J.A. 63). There is thus no factual basis for assertion that "local control by local schools" provides any sort of justification for the impairment of contractual obligation in this case. There is no facially-neutral, homogeneous school finance structure in Mississippi to be protected. These assertions regarding the structure of Mississippi school finances amount to no more than a circular argument: the irrational discrimination against the Chickasaw counties should be permissible so that an overall system of school financing which is irrationally discriminatory against the Chickasaw counties may be maintained.

Even if a non-specious rationale could be imagined, the "reasonable and necessary" requirement, in this context of school lands trusts, places an extremely heavy burden upon state officials to justify impairment of the contractual obligations. Proper maintenance of the school lands trust is, in and of itself, a "vital interest" for a state. *United States Trust Co.*, 431 U.S. at 31; *see also El Paso v. Simmons*, 379 U.S. 497, 498, 509 (1965) (protection of the school lands trust was of such a high priority as to constitute a "reasonable and necessary" basis for a state to alter other contractual obligations). State officials are thus in the precarious position of trying to show that mismanagement and improper maintenance of the school lands trust is "more reasonable and necessary" than is proper maintenance of the school lands trust. This continuing breach by the state officials of their contract duties is neither reasonable nor necessary. The schoolchildren of the Chickasaw Cession are entitled to prospective, injunctive relief from this improper conduct.

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[21] It has been repeatedly held that the passage of time in the form of limitations periods does not provide a defense to this continuing duty. *See supra* § I(E).

[22] It also fails as a matter of logic: How can land values be a "base" when the Chickasaw Cession Counties have no school lands?

III. PROSPECTIVE INJUNCTIVE RELIEF TO PREVENT STATE OFFICIALS FROM CONTINUING TO DEPRIVE THE CHICKASAW CESSION SCHOOL CHILDREN OF THE BENEFITS AFFORDED ALL OTHER MISSISSIPPI SCHOOL CHILDREN BY THE FEDERALLY-CREATED SCHOOL LANDS TRUST IS NOT BARRED BY THE ELEVENTH AMENDMENT

A. This Suit For Violations Of Federal Constitutional And Statutory Rights Seeks Prospective Injunctive And Remedial Relief

State officials have breached their obligations to the Chickasaw Cession schoolchildren, and continue to breach these obligations on an annual basis. To this claim of injury the Fifth Circuit responded:

> Assuming that a binding federal compact was created and breached over a century ago, the federal courts have no jurisdiction to address the breach, given the nature of the relief sought.
>
> *-Papasan*, 756 F.2d at 1094 (P.A. A-23-24).

The Fifth Circuit refused to enjoin future breaches of the trust created by federal statutes and governed by federal law[23] on the theory the initial breach occurred in the past, prohibition of future breaches might involve the expenditure of state funds, and certain of the obligations of defendants were defined by state, not federal, law.

The analysis of an ordinary eleventh amendment issue is two-fold: First, the court examines whether the suit itself can be brought, a question answered by applying the standard of *Ex parte Young*, 209 U.S. 123 (1908) and its progeny; and second, the court examines whether the relief sought is permitted by the amendment, a question answered by applying the standards of *Edelman v. Jordan*, 415 U.S. 651 (1974) and its progeny. The pertinent decisions of this Court demonstrate that federal courts can enforce the obligations and secure the benefits of the trust within the strictures of the eleventh amendment.

[23]We have demonstrated that the obligations and benefits of this trust are governed by federal law. *See supra* § I(D).

Two distinct types of relief are sought here: First, the basic relief afforded by an injunction prohibiting the state officials from continuing to violate their fiduciary duties in the future, and second, the full relief afforded by an order such as that in *Milliken v. Bradley*, 433 U.S. 267 (1977), requiring funding of remedial programs to cure the on-going effect of the denial of a minimally adequate education.

B. Federal Courts Have Jurisdiction To Hear Suits Based On Action By State Officials That Violate Federal Statutes Or The Federal Constitution

Since *Ex parte Young*, 209 U.S. 123 (1908), it has been clear that actions by state officials that violate federal law are *not given* eleventh amendment immunity. *Scheuer v. Rhodes*, 416 U.S 232, 237 (1970). "Federal law" includes not only the Constitution but also federal statutes.[24] Thus, in *Edelman*, 415 U.S. at 664, this Court did not interfere with the prospective, injunctive portions of relief granted on the claim for violation of federal statutes governing welfare benefits. *See Quern v. Jordan*, 440 U.S. 332, 349 (1978)(subsequent appeal of *Edelman* upholding notice relief under same welfare statutes); *Coalition for Basic Human Needs v. King, et al.*, 654 F.2d 838, 842 (1st Cir. 1981)(upholding relief for the same violation of the same statutes).

[24]While Milliken involved formulating the remedy for a constitutional violation, there is no suggestion in the opinion that the relief as formulated is limited to constitutional violations. *Coalition for Basic Human Services v. King*, 654 F.2d 838, 842 (1st Cir. 1981) states: "Nor do we think, under the plain language of *Edelman* and *Milliken*, that it is important that the substantial federal question involved here is statutory rather than constitutional."

C. Federal Courts Have Jurisdiction To Enjoin Continuing Violations Of Federal Law By State Officials Despite The Possibility Of An Ancillary Effect On A State's Treasury

The principal thrust of the Complaint is that state officials be enjoined to cease their future annual violations of the duties imposed on them by federal statutes as trustees of the school lands trust. *Edelman* teaches that the fact such an injunction might have a future ancillary effect on the state treasury does not produce an eleventh amendment bar. *Edelman* uses other welfare cases as examples of permissible "ancillary effect[s] on the state treasury." The Court noted two other cases where the state was enjoined from denying welfare benefits for certain claimants, one on equal protection grounds, the other on due process grounds. *See Edelman v. Jordan*, 415 U.S. at 667-68 (noting *Graham v. Richardson*, 403 U.S. 365 (1971); and *Goldberg v. Kelly*, 397 U.S. 254 (1970)). In both cases, the state officials, in order to comply with the decree, "would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct." *Edelman*, 415 U.S. at 668. This, the Court held, was "an ancillary effect on the state treasury [that] is a permissible and often inevitable consequence of the principle announced in *Ex parte Young*." *Edelman*, 415 U.S. at 668.

In this suit, the Fifth Circuit reasoned that any rights otherwise afforded by the school lands trust are eleventh amendment barred because "the relief sought here 'requires the payment of state funds, not as a necessary consequence of compliance in the future with substantive federal question determination, but as a form of compensation'. . .for legal breaches which occurred more than one hundred and fifty years ago." *Papasan*, 756 F.2d at 1094 (citing *Edelman*, 415 U.S. 668) (P.A.A-26). This reasoning completely ignores the allegations of the Complaint: The state officials, charged with the continuing duty of carrying out the obligations of school lands trustee, refuse to adhere to the stated purposes of the school lands trust.

Complaint ¶45 (J.A. 17-18). No part of the trust income is distributed to Chickasaw Cession schools. The pittance provided to Chickasaw Cession Schools, "in lieu of" trust income, is a fraction of the income enjoyed by schools outside the Chickasaw Cession. At no time since the trust was breached initially have the Chickasaw Cession counties enjoyed income commensurate with what would have been forthcoming had the state initially not breached its trust obligations. Having breached the trust, state officials continue to refuse to the present day to provide the schools of the Chickasaw Cession with trust income commensurate with trust obligations. This is nothing less than a continuing breach of trust obligations. The injunctive relief sought for this violation of the trust is entirely prospective: Comply in the future with the trust obligations assumed by virtue of the school lands trust by providing Chickasaw Cession schools with trust income commensurate with the obligations imposed by the trust.

As recently as December 3, 1985, this Court stated the eleventh amendment is no bar to prospective injunctive relief predicated upon wrongful acts which will continue in the future unless enjoined:

> Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. See *Pennhurst, supra* at 102. See also *Milliken v. Bradley*, 433 U.S. 267 (1977). But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.
>
> *-Green v. Mansour*, ___ U.S. ___, 85 L.Ed.2d 158 (1985).

D. The Eleventh Amendment Permits Relief In The Form Of Remedial Programs To Correct The Present Effect Of A Continuing Deprivation Suffered By The Chickasaw Cession Schoolchildren

In *Milliken v. Bradley*, 433 U.S. 267 (1977), the Court affirmed an award of four remedial programs to cure the effects on black students of an equal protection violation. The costs of these programs "was to be equally borne by the Detroit School Board and the State." *Milliken*, 433 U.S. at 277. The only relief awarded against the state was that it pay one-half of these costs. The state argued that the eleventh amendment shielded it from an order to fund the remedial program. The Court held this relief to be permissible under the eleventh amendment. 433 U.S. at 289-90. The Court noted that in *Edelman*, 415 U.S. at 663-64, the improper relief "sought 'the award of an *accrued* monetary liability. . .' which represented 'retroactive payments.' " *Milliken*, 433 U.S. at 289 (quoting *Edelman*, 415 U.S. at 663-64)(omission in original). In contrast, stated this Court, a suit is "proper to the extent it sought 'payment of the state funds. . .as a necessary consequence of compliance *in the future* with a substantive federal-question determination. . . .' " *Milliken*, 433 U.S. at 289 (citing *Edelman*, 415 U.S. at 668) (omission in original). Thus it was held that the relief ordered—that the state *pay money* in the future *to remedy a "substantive federal question determination"*—was permissible. *Milliken*, 433 U.S. at 289-90 (citing *Edelman*, 415 U.S. at 667). By analogy, the court may determine that prohibitions of future violations of the school lands trust, while incidentally affording additional trust income to the Chickasaw Cession schools in the future, will not remedy the denial of a minimally adequate education. In that case, the court has jurisdiction to require the payment of additional sums to fund a remedial program.

In *Milliken*, the Court spoke of a "minimal quality educational program". *See Milliken*, 433 U.S. at 291-292 (Marshall, J. concurring). There exists in the Chickasaw

Cession a substantial group of school children who are deprived of a "minimally adequate education." Complaint ¶ 2, 55 (J.A. 2, 21-22). While school segregation was the cause of the deprivation in *Milliken*, discriminatory disbursement of trust income is the cause here. Complaint ¶ 51-56 (J.A. 20-22).

Thus it is important to note that the *Edelman*-type injunctive relief requested does not probe the outer limits of *Milliken*, and that relief can be afforded without doing so. Should the court go no further than to require the state officials to comply in the future with their continuing duties under the school lands trust, any effect on the state treasury is ancillary to such an injunction and clearly does not run afoul of the eleventh amendment. Only in the event the court agrees that the state should be made to fund a remedial program, designed to bring up the standards of the Chickasaw Cession schools to those in the rest of the state, will true *Milliken* relief be involved.

The *Milliken*-type relief we seek will not "wipe the slate clean by one bold stroke", as would a retroactive award as proscribed by *Edelman*. *Milliken*, 433 U.S. at 290. As in *Milliken*, the remedial relief sought involves"no monetary award. . .to the members of [the] class. This case simply does not involve a raid on the State treasury. . . ." *Milliken*, 435 U.S. at 290 n.22. This is an action by public officials and beneficiaries of a public trust created by federal law and in an area of high federal interest. It is not an action that will line the pockets of the individual litigants should they prevail—it will benefit the public generally. The continuing violations of federal law, as well as the effect those violations have imposed on the schoolchildren of the Chickasaw Cession, justify relief in addition to the prohibition of future trust violations.

IV. THE DISCRIMINATION IMPOSED ON THE CHICKASAW CESSION SCHOOLCHILDREN IS NOT RATIONALLY RELATED TO A LEGITIMATE PURPOSE

A. Application Of Low Scrutiny Does Not Preempt A Detailed Examination Of The Conduct Of State Officials

Discriminatory deprivations of educational opportunity require, at the least, a rational basis before they can be justified.

> The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike.
>
> [. . . .]
>
> The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.
>
> *-Cleburne v. Cleburne Living Center*, ___ U.S. ___, 87 L.Ed.2d 313, 320 (1985).

In *Papasan*, the Fifth Circuit's analysis of the rational basis for discrimination against the Chickasaw Cession schoolchildren is so superficial as to amount to no analysis at all.

> Plaintiffs' argument is then by necessity, that their receipt of less school lands money than that received by southern counties reduces the quality of education below that provided children in non-Chickasaw Cession districts. . . .a difference is not a denial of equal protection unless it lacks a rational basis. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 98 S.Ct. 1278, 36 L.Ed.2d 16 (1973). That rationality is found in the state's structure of school finances. With land values as a base and desired local administration of local schools, income differences are inevitable.
>
> *-Papasan*, 756 F.2d at 1095. (P.A. A-29-30)

The Fifth Circuit did not delve into the facts underlying the Chickasaw Cession schoolchildren's claim detailed in the Complaint. Thus, the Fifth Circuit ignored the method this Court has prescribed for undertaking rational basis review.

Rational basis analysis is demonstrated in the recent cases of: *Cleburne v. Cleburne Living Center*, ___ U.S. ___, 87 L.Ed.2d 313 (1985); *Hooper v. Bernalillo County Assessor*, ___ U.S. ___, 86 L.Ed.2d 487 (1985); *Williams v. Vermont*, ___ U.S. ___, 86 L.Ed.2d 11 (1985); *Zobel v. Williams*, 457 U.S 55 (1982). In these cases the Court thoroughly analyzes each facet of the challenged governmental conduct and considers how such conduct interfaces with, and affects, the offended citizens. Thus, the approach is to require a complete articulation of the discrimination and its effects. The thoroughness employed does not vary with the level of scrutiny (strict/intermediate/low). Differences in levels of scrutiny determine only how far behind a government's justification for a discrimination a court will inquire, and not whether a court will bother to articulate a cogent picture of the discrimination. *See Cleburne*, 87 L.Ed.2d at 317-19, 325-27 (scrutiny focuses upon the proposed "purpose" to be served); *Williams v. Vermont*, 86 L.Ed.2d at 19 (same); *Zobel v. Williams*, 457 U.S. 55, 60 (1982)(same).

Cleburne v. Cleburne Living Center is illustrative of the articulation that must be performed of a challenged discrimination. In *Cleburne*, a city zoning ordinance prevented the establishment of an intermediate care facility for the mentally retarded. After thoroughly articulating the discrimination, the Court then subjected the asserted rational bases to low scrutiny review.

Two things are evident about rational basis review from *Cleburne*: (1) that a thorough articulation of the discrim-

ination must be performed so that proper evaluation of the rationality of each asserted basis may be made; (2) that, while only rationality will be required of a law that has a legitimate purpose, the government's asserted bases will not be accepted as rational on mere faith.

> The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.
>
> *-Cleburne*, 87 L.Ed.2d at 3214 (citing *Zobel v. Williams*, 457 U.S 55, 61-63 (1982))

The question which the respondent trustees must address is: what justification is there for a refusal to cease discriminating against the Chickasaw Cession schoolchildren?

B. There Is No Rational Basis For The Discrimination Against The Chickasaw Cession Schoolchildren

The Fifth Circuit's cursory treatment of the discrimination experienced by the Chickasaw Cession schoolchildren demonstrates its misunderstanding of the workings of Mississippi's school finance structure. Neither the desire for local administration of local schools, nor differences in local land values, are the bases of the discrimination which exists here for the following three reasons:

> (1) the Fifth Circuit stated that the Chickasaw Cession schools receive "less" school lands money when, in fact, the twenty-three counties in the Chickasaw Cession receive no school lands trust income at all, but only a pittance appropriation in lieu of such income.
>
> (2) the Fifth Circuit postulated that school lands trust income was predicated on differences in land values in different counties. But land values cannot be the "base" for determination of income from the school lands trust because the Chickasaw Cession counties have neither school lands to use as a base, nor a trust fund to manage and invest.

> (3) the Fifth Circuit indicates that there is a uniform statewide system delegating the administration of school lands to local school boards. But there is no such single uniform system. There is instead a bifurcated discriminatory system. While the state officials delegate their land management duties imposed by the trust to local school boards in the fifty-nine counties outside the Chickasaw Cession, there are no trust lands to manage in the Chickasaw Cession and the Chickasaw Cession school boards are given no voice whatsoever in the "management" of the mythical corpus constituting their share of the trust.

The Fifth Circuit assumed that the difference between the income received from the school lands trust by the non-Chickasaw Cession schools, and the pittance appropriation received by the Chickasaw Cession schools, is the result of pure happenstance as in *Rodriguez* rather than the result of the trust violations on the part of the state officials. As explained heretofore, the deprivation suffered by the Chickasaw Cession schoolchildren is not the result of happenstance, but rather the result of purposeful discrimination.[25] Once the discrimination against the Chickasaw Cession schoolchildren is articulated and understood, it is apparent that this discrimination cannot be rationally related to any legitimate purpose. The invidious discrimination, in fact, serves no purpose whatsoever, but rather is a result of state officials ignoring their fiduciary duties as trustees under the federal school lands trust. The deprivation suffered by the Chickasaw Cession schoolchildren is so egregious and so lacking in rational basis that even under low scrutiny the conduct by Mississippi state officials must be held to violate the equal protection clause.

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[25]The two excuses for the discrimination discussed in the Fifth Circuit opinion—"land value as a base" and "historical accident"—have been previously discussed and demonstrated to be not rationally related and downright non-sequitur. *See supra* §II(B).

C. Though This Court Has Not Expressly Announced A Test For When Intermediate Review Is Available In The Educational Context, An Overall Method Of Analysis Is Apparent

It is common practice for this Court to eschew addressing broader constitutional issues if challenged governmental regulation can be invalidated under rational basis review. *Williams v. Vermont*, ___ U.S. ___, 86 L.Ed.2d 11, 22 (1985)(narrow holding not addressing broader constitutional challenges). The discrimination against the Chickasaw Cession schoolchildren could be resolved under this common practice. However, in the unlikely event this Court does not strike down under rational basis review the discriminatory conduct by Mississippi state officials, petitioners seek a determination that the discrimination they suffer warrants intermediate scrutiny.

In *Plyler v. Doe*, 457 U.S. 202 (1982), this Court held that a discriminatory absolute denial to a free public education will warrant intermediate scrutiny under the equal protection clause. 457 U.S. at 230. Unlike usual equal protection analysis, this level of scrutiny was appropriate despite the fact that neither a "fundamental right" nor a "suspect class"[26] was involved. 457 U.S. at 223.

> "...some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."
>
> *Plyler*, 457 U.S. at 221 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

This Court has never addressed whether less-than-absolute (partial) denials of educational opportunity would warrant intermediate review or warrant only low scrutiny (rational basis) review. Nonetheless, the Fifth Circuit founded its

[26]The invocation of intermediate scrutiny in *Plyler* was not triggered by the fact that aliens—perhaps a quasi-suspect class—were involved. 457 U.S. at 219 n.19.

denial of intermediate review on precisely this distinction. *Papasan*, 756 F.2d at 1075 (P.A. A-28).

This Court has, however, held that a mere differential in the funding of school districts will not warrant intermediate review when the differential: (1) is an accidental result of a facially-neutral, homogeneous, statewide school financing system (based upon local property taxes),[27] and (2) does not result in denying any child a minimally adequate education. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 24, 55 (1973).

Careful attention to the salient features in *Plyler* and *Rodriguez* yields the following comparison:

> (1) In *Plyler*, state officials *acted discriminatorily*—that is, with intent to single out a specific group of children for different treatment—and in the denial of equal educational opportunity caused *extreme prejudice* to the alien schoolchildren;
>
> (2) In *Rodriguez*, state officials *did not discriminate*—no distinction was drawn between groups of schoolchildren—and the accidental funding differential resulted in *no cognizable prejudice* to the resulting education.[28]

In view of the foregoing comparison,[29] the plight of the Chickasaw Cession schoolchildren, while not mirroring the

[27]While not expressly a factor in the *Plyler* holding, the injury in *Plyler* was not accidental, but was rather the result of discriminatory acts by state officials in drawing a legal distinction between the alien schoolchildren and other schoolchildren generally. 457 U.S. at 205. Similarly, the Chickasaw Cession schoolchildren—the trust beneficiaries—are singled out for special deprivation by state officials who violate their duties as trustee.

[28]The funding differential was found "not the product of purposeful discrimination against any group or class." 411 U.S. at 55. Also, after a lengthy trial, it was not disputed in *Rodriguez* that all children received an adequate education. 411 U.S. at 24-25, 36-37.

[29]While perhaps coincidental, this comparison points out that this Court's framework for determining when intermediate review is available produces results similar to what one would derive from application

facts in *Plyler* or *Rodriguez*, does fit well into the overall method of analysis used by this Court. The Chickasaw Cession schoolchildren, like those in *Plyler* and unlike those in *Rodriguez*, suffer this victimization as a result of affirmative acts of discrimination by state officials that divide Mississippi schoolchildren into two classes and treat one of those classes in a shameful manner. Further, through the denial of a minimally adequate education,[30] the Chickasaw Cession schoolchildren—while they do not suffer an absolute denial of educational opportunity as in *Plyler*—suffer *extreme prejudice* as the children in *Plyler* did.[31] The foregoing illustrates that intermediate scrutiny is the appropriate level for evaluating the deprivation suffered by the Chickasaw Cession schoolchildren. Use of this level of scrutiny is entirely consistent with this Court's prior opinions in *Plyler* and *Rodriguez*.[32]

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of a "cause and prejudice" test. *See Strickland v. Washington*, ___ U.S. , 80 L.Ed.2d 674 (1984) (cause-and-prejudice test in ineffective assistance of counsel determinations); *Engle v. Isaac*, 456 U.S. 107, 135 (1982) (cause-and-prejudice test employed in evaluating waiver in habeas corpus).

[30]Given the procedural posture of this case, this injury asserted in the Complaint at ¶¶ 2, 37-38, 51-55 (J.A. 2, 14-15, 20-22), must be accepted as true.

[31]The paltry sums received "in lieu of" school lands trust income by the Chickasaw Cession schools have no relationship whatsoever to differing land values or differing levels of local land management.

[32]Other evidence that a heightened scrutiny is appropriate for evaluating discrimination in the area of educational opportunity is contained in the policy embodied in congressional legislation designed to secure rights and protection to education.

> Recognizing that the Nation's economic, political, and social security require a well-educated citizenry, the Congress (1) reaffirms as a matter of high priority, the Nation's goal of equal educational opportunity, and (2) declares it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential without financial barriers.
>
> 20 U.S.C. 1221-1 (1974).

D. Intermediate Review Should Be Available For Educational Deprivations That Are Caused By Discriminations That Result In Prejudice—Whether Characterized As "Absolute" Or "Partial"

There would appear little to support the reasoning—employed by the Fifth Circuit—that an absolute denial of educational opportunity warrants intermediate review, but a partial (non-absolute) denial of educational opportunity so severe as to deprive children of a minimally adequate education warrants only rational basis review. Following this logic, intermediate review would be inappropriate if a state provided a separate-but-unequal system—as does Mississippi—in which the schools are "inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved in travel." *Brown v. Board of Education of Topeka*, 347 U.S. 483, 487-88 n.1 (1954) (describing the conditions in Delaware's separate-but-unequal schools). The discriminatory treatment which the Chickasaw Cession schoolchildren receive at the hands of state officials is no more justified than would be the identical mistreatment based on race.

Moreover, there is little logical integrity to the distinction between "absolute denials" and "partial denials". A "partial" deprivation from one point of view is often an "absolute" deprivation from another. The deprivation in *Plyler* can be characterized as involving either a "partial" or an "absolute" deprivation. If *Plyler* is construed to involve educational opportunities generally, then the deprivation is only partial as the parents of the alien schoolchildren could pay tuition to obtain the desired education. If, however, *Plyler* is said to involve the availability of a *free* public education, then the deprivation is absolute.

As with *Plyler* schoolchildren, the plight of the Chickasaw Cession schoolchildren can fit under either "partial" or "absolute" labels. With regard to the availability of educational opportunity generally, the Chickasaw Cession schoolchildren suffer a partial deprivation. But, with respect to the receipt of school lands trust funds, the Chick-

asaw Cession schoolchildren suffer an absolute deprivation—they receive not one penny of money generated from school trust lands.[33]

The foregoing illustrates that "partial" and "absolute" characterizations of deprivation are artificial thresholds for choosing what level of scrutiny is appropriate. "Partial" and "absolute" are tools of analysis, not bins to put cases in. Nearly every discrimination can fit under either label depending on what point of view one adopts—and either viewpoint would appear totally proper. Determinations of what level of scrutiny is constitutionally demanded cannot rest upon such unpredictable and will-o-the-wisp labeling.

E. The Discrimination Against The Chickasaw Cession Schoolchildren Warrants Intermediate Level Review

The Chickasaw Cession schoolchildren are the victims of invidious discrimination. In eligibility for the benefits of school lands trust income, Chickasaw Cession schoolchildren are segregated from schoolchildren in the rest of the state. This segregation serves no legitimate purpose, let alone an important governmental objective. *See supra* §II(B).

The Fifth Circuit's reliance upon the "partial deprivation/absolute deprivation" dichotomy has been demonstrated to be a specious basis for evaluating the availability of intermediate review. Analysis has also revealed that the discrimination and prejudice suffered by the Chickasaw Cession schoolchildren is homologous with that imposed upon the schoolchildren in *Plyler*. Further, there is a high federal interest in securing equal and adequate educational opportunities throughout our nation. Given this situation, the Chickasaw Cession schoolchildren are entitled to have

[33]The pittance the Chickasaw Cession schools do receive is a legislative appropriation connected neither in source or amount to the school lands trust fund.

the discrimination against them evaluated under intermediate scrutiny.[34]

CONCLUSION

This case should be remanded for a full trial on the merits on all claims so that, as swiftly as possible, the Chickasaw Cession schoolchildren may be afforded relief from the continuing violations visited upon them.

Respectfully submitted,

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[34]Petitioners realize that this Court may be reticent to announce a constitutional principle concerning levels of review in a case with no developed proof regarding the challenged discrimination. Given the procedural immaturity of this case, the Chickasaw Cession schoolchildren deserve at least the opportunity to develop a full record so that this Court can more properly analyze the propriety of intermediate review for this discrimination.